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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

MICHELLE MONIER-KILGORE, Individually
and as Special Administrator, etc.,
et al.,

Plaintiffs and Respondents,

v.

STEVEN FLORES et al.,

Defendants and Appellants.

C054502

(Super.Ct.No.
SCV14418)

MICHELLE MONIER-KILGORE, Individually
and as Special Administrator, etc.,
et al.,

Plaintiffs and Appellants,

v.

STEVEN FLORES et al.,

Defendants and Respondents.

C056348

(Super.Ct.No.
SCV14418)

These appeals arise from a lawsuit that was filed by the family of decedent Claudette Monier, who left her estate to her spiritual

advisor and healer. Plaintiffs Michelle Monier-Kilgore (decedent's sister) and Michael and Cecile Monier (decedent's parents) sued defendants Fatten "Leila" Pablo, Steven Flores, and Eulalio Flores¹ for cancellation of Claudette's will and trust, for the imposition of a constructive trust, and for damages arising out of defendants' alleged undue influence, fraud, and negligence.

In case No. C054502, defendants appeal from the judgments in favor of plaintiffs. They raise various claims of instructional error; challenge the trial court's invalidation of Claudette's will and trust; contend the negligence verdict is infirm for multiple reasons; and challenge the award of compensatory and punitive damages on several grounds.² We shall (1) reverse the portion of the judgments awarding plaintiffs \$300,000 against Steven and \$10,000 against Leila for their negligence; (2) reverse the \$360,000 unjust enrichment award against Leila and remand for the trial court to conduct further proceedings to calculate the appropriate measure of damages; (3) reverse the judgment against Eulalio, with directions to conduct further proceedings and to enter a new judgment; (4) direct the trial court to clarify or modify the judgments against Steven and Leila awarding plaintiffs

¹ Because of the similarity in the last names of some of the parties, we shall refer to decedent and the parties by their first names for ease of reference and to avoid confusion.

² In their opening brief, defendants also contend the trial court erred in allowing introduction of evidence concerning the sexual relationship between Steven and Leila. Because they expressly abandon the contention in their reply brief, it requires no further discussion.

compensatory damages for defendants' unjust enrichment as well as imposing a constructive trust on the property which is the subject of the compensatory damages; and (5) reverse the punitive damage awards of \$1 million against Steven and \$100,000 against Leila. In all other respects, we shall affirm the judgments.

In case No. C056348, plaintiffs appeal from the denial of their motion for an order to enforce the judgment by directing Steven's attorney, John Henderson, to account for all attorney fee payments he received from Steven that were traceable to life insurance proceeds on which the court had imposed a constructive trust.³ We shall affirm the order denying plaintiffs' request to enforce the judgment against Henderson.

FACTS

Viewed in the light most favorable to the judgment (*Jonkey v. Carignan Construction Co.* (2006) 139 Cal.App.4th 20, 24), the evidence at trial disclosed the following:

Claudette was the owner/operator of a small deli sandwich shop that had been owned by her parents for a number of years before she purchased it from them in 1994 or 1995. According to her family and friends, Claudette not only was devoted and loving to her family, she was industrious, frugal, and did not like going into debt.

³ In case No. C054502, plaintiffs ask us to take judicial notice of the record in case No. C056348. Because we have consolidated the two cases on our own motion, the request is moot.

Claudette began to change after her cousin Leila recommended that Claudette see Steven. Leila had briefly lived with Steven in Roseville before she moved in with his elderly father Eulalio, who resided next door. Steven was a massage therapist, certified Reiki master, and self-professed clairvoyant, who had taken classes at the Berkeley Psychic Institute. He was also a minister of the Universal Life Church and a spiritual counselor or spiritual healer. His business card stated he performed massage, Reiki, hypnotherapy, past life regression, psychometry, and eternal life activation. Steven received SSI income due to a knee injury and supplemented his income with his healing and massage work.

In 1999, Claudette began seeing Steven for aura and card readings. Steven started doing "body work" on Claudette in 2000. She told friends and family that Steven was healing her, helping her find peace, and cleansing her past via hypnosis and suggested psychological readings and tapes. Steven advised her that she should not be around her family because they had "bad energy." He said her mother was an "emotional vampire" and her brother had been molested. He also advised her that her boyfriend, George Dahdouh, was not the one for her.

Claudette ended her relationship with George. She also sold the deli in May 2001, sold her duplex in February 2002, and bought a house in Roseville, the city in which Steven lived, because Steven told her she needed to make a new start and cleanse her past. She began to avoid family events and rarely had contact with family members. Michelle testified that when she was able

to talk to Claudette, it was like a recorded script delivered in a monotone.

Claudette told friends that Steven was her spiritual advisor, who had a "special power." She began to refer to Steven's family as hers, and went to his family functions. She refused to give out her cell phone number, stating it was only for Steven. She claimed that Steven's tapes had the voices of spirits on them. Her cousin believed that Claudette had "gone over the edge."

After Claudette sold the deli, she paid for Leila and Steven to accompany her on a trip to Hawaii. When Claudette returned and Cecile was helping her pack up the duplex for her move to her new house in Roseville, Cecile found pictures from the Hawaii trip that showed Steven's hand on Leila's "front." When Cecile became upset Steven touched Leila there, Claudette replied it was okay because he was their spiritual healer.

Steven's relationship with Claudette evolved into a sexual one around the time that she sold the duplex, and she gave Steven a key to her new house in Roseville. Despite discussing marriage with Claudette and leading her to believe they were engaged, Steven continued his pre-existing sexual affair with Leila. Steven also continued his "healing" work with Claudette, which, according to expert testimony, was akin to psychological counseling and which, according to friends, involved hypnosis. One expert testified that it was not impossible to use hypnosis to convince people to do things they ordinarily would not do, and that if (1) Steven used hypnosis on Claudette, (2) she was easily hypnotizable, (3) he had a lot of influence over her, and (4) he kept her away from the

corrective input of other people, then Steven would have had more effect on Claudette's behavior than he would have without using hypnosis.

With Steven's encouragement, Claudette decided to become a psychic healer and massage therapist, went to school for massage training, and planned to go into business with Steven. Based on her plan of being Steven's business and life partner, Claudette implemented an estate plan that left everything to Steven. He was involved in this process and was with Claudette when she signed the will and trust documents. Claudette also obtained various life insurance policies in the amounts of \$250,000, \$1,000,000, \$20,000, and \$2,000 naming Steven as beneficiary, and obtained another policy in the amount of \$350,000 naming Leila as beneficiary. Claudette gave Steven a durable power of attorney as to all her financial affairs and health care decisions in the event she became incapacitated.

Claudette did not go into practice with Steven. However, they did take trips--funded for the most part by Claudette--to Cancun and Hawaii with Leila. They also traveled to Sedona, Lake Tahoe, Monterey, San Francisco, the wine country, Mount Shasta, and Reno. Steven and Leila went on trips together without Claudette, at Claudette's expense. Claudette paid for some of the trips with equity she had taken out of her Roseville home when she refinanced it.

Claudette trusted Steven and Leila. In fact, she entrusted her financial and personal information to them by making them joint account holders with her on various banking, retail, and

credit accounts; by allowing them access to, or control of, her financial records and checking account; by placing Steven on her mortgage and equity line of credit accounts; and by placing Leila on Claudette's auto insurance account. Claudette transferred title, possession, and/or control of various motor vehicles to Steven, Leila, and Eulalio. She also gave them money, or they withdrew money from her accounts. Steven convinced Claudette to purchase gold and silver as an investment, which he later sold and then placed the proceeds in his personal bank account to pay his bills. He also forged checks on her Golden One checking account to pay his creditors.

By the end of 2003, Claudette and Steven had ended their relationship but purportedly remained friends, with Steven keeping a key to her house. Claudette's income was minimal, her financial assets were depleted, and she was drowning in credit card debt. Steven continued to use Claudette's remaining financial resources and credit to pay for things such as vacations, golfing, truck accessories, and cigars.

In the early morning hours of March 4, 2004, Claudette was in a single car accident after she drank to the point of passing out, awakened, and went for a drive. She appeared to be depressed but denied she was suicidal. She claimed she had no one who could take care of her, or at least no one on whom she wanted to impose.

On the night of July 18, 2004, while still recovering from her last accident, Claudette died after riding her bicycle into the path of a big rig truck. She was not wearing a helmet, had on dark clothes, and did not have a light on her bicycle.

Within days of her death, Leila and Steven submitted claims for death benefits from Claudette's life insurance policies issued by Globe Life Insurance (Globe), Balboa Life Insurance Company (Balboa), West Coast Life Insurance Company (West Coast), CNA/Valley Forge Life Insurance Company (Valley Forge), and Zurich Life/Fidelity Life Association (Fidelity). Globe and Balboa paid Steven \$22,000 relatively promptly, but defendants' claims were initially denied by West Coast, Valley Forge, and Fidelity. Valley Forge and Fidelity later paid Steven \$1,025,000. West Coast did not pay any insurance benefits to Leila.

Steven and Leila used some of the insurance money to take a trip to Hawaii.

On February 22, 2005, plaintiffs sued Steven, Leila, and Eulalio for fraud, breach of trust and confidence, constructive fraud, undue influence, negligent misrepresentation, conversion, breach of fiduciary duty, intentional infliction of emotional distress and negligence. Plaintiffs sought to recoup the life insurance monies, set aside the will and trust, obtain an accounting, impose an involuntary or constructive trust, and recover compensatory and punitive damages.

Plaintiffs theorized that defendants were lovers and partners who intentionally or negligently took advantage of a vulnerable young woman by gaining her trust, separating her from her family, and then divesting her of her financial assets. According to their attorney's closing argument, once Claudette's bank accounts were depleted and her credit was "maxed out," "[t]he only way that any more money could be drawn out of Claudette Monier was if she died.

She had to die. She had to get a new life. She had to leave this physical life and move to her next life. [¶] Her eternal life had to be activated."

The jury returned a general verdict in favor of plaintiffs against all three defendants. The jury also returned special findings on the general verdict concerning the extent of each defendant's wrongful conduct and liability. It found that Eulalio had wrongfully exercised possession or control over Claudette's Lexus automobile, and awarded damages of \$12,500. It found that Steven and Leila had unfairly obtained numerous benefits--including the life insurance proceeds--through acts of fraud, undue influence, breach of trust, or other wrongful conduct; that Claudette's will and trust naming Steven as successor trustee and sole beneficiary were the result of Steven's fraud, undue influence, breach of trust, or other wrongful conduct; that Steven was unjustly enriched by his wrongful conduct in the amount of \$1,100,000, and the estate had been damaged by his negligence in the amount of \$300,000; that Leila was unjustly enriched by her wrongful conduct in the amount of \$360,000, and the estate had been damaged by her negligence in the amount of \$10,000; and that punitive damages were warranted in the amount of \$1,000,000 against Steven and \$100,000 against Leila.

On September 6, 2006, the trial court entered an order from the bench imposing a constructive trust on the insurance proceeds and real and personal property.

Thereafter, the court entered judgment on the verdicts and ordered that defendants were involuntary trustees for the benefit

of Michelle, as special administrator of the estate, of the wrongfully acquired assets.

Plaintiffs learned that prior to the entry of judgment, Steven paid his attorney, John Henderson, approximately \$532,000 in attorney fees, which represented a 40 percent contingency fee for Henderson's assistance in recovering \$1,025,000 in life insurance death benefits from Valley Forge and Fidelity, and approximately \$110,000 in hourly attorney fees for Henderson's time defending Steven and Leila against plaintiffs' lawsuit. Plaintiffs sought to recover the money from Henderson, contending it was subject to the constructive trust imposed on the insurance proceeds Steven received. Their unsuccessful motion, which is the subject of case No. C056348, will be discussed in greater detail subsequently when we address plaintiffs' appellate contentions.

DISCUSSION

I

Defendants contend the judgment invalidating the will and trust must be reversed because the court committed instructional error concerning the elements of plaintiffs' cause of action for undue influence in being named a beneficiary under a will or trust.

"Undue influence consists of conduct which subjugates the will of the testator to the will of another and causes the testator to make a disposition of his property contrary to and different from that which he would have done had he been permitted to follow his own inclination or judgment. [Citation.] A presumption of undue influence arises when there is a concurrence of the following elements: (1) the existence of a confidential or fiduciary

relationship between the testator and the person alleged to have exerted undue influence; (2) active participation by such person in the preparation or execution of the will; and (3) an undue benefit to such person or another person under the will thus procured.” (*Estate of Baker* (1982) 131 Cal.App.3d 471, 480.) Where such a presumption arises, the burden shifts to the person profiting under the will to show that the will is not the product of undue influence. (*Id.* at p. 483.)

“Activity on the part of the proponent in procuring execution of the will may be established by inference, that is, by circumstantial evidence. [Citations.] ‘While it is true that there must be proof that the influence was used directly to procure the will, general influence not brought to bear upon the testamentary act not being undue influence [citation], such proof exists where the evidence is of such a nature as to warrant the inference that the will was the direct result of the influence exerted for the purpose of procuring it, and was not the natural result of the uncontrolled will of the testatrix.’ [Citations.] In determining whether undue influence was exerted by the proponent upon the testator in the execution of his will, the jury is not limited to the actual time the will was executed, but may consider facts bearing upon undue influence both before and after execution so long as they tend to show such influence when the will was executed. [Citation.] Nor need the one using the undue influence be present in person at the time of the execution of the document if the influence is present to constrain the party from exercising his free will. The evidence of the use of undue influence need

not be direct but may be circumstantial. [Citation.] “That the alleged wrongdoer had power or ability to control the testamentary act may be established by a variety of circumstances,--such as control over the decedent’s business affairs, dependency of the decedent upon the beneficiary for care and attention, or domination on the part of the beneficiary and subserviency on the part of the deceased. Unless explained, a transfer of property by the decedent to the alleged wrongdoer has a tendency to establish the charge of undue influence. . . .” [Citation.]” (*Estate of Baker, supra*, 131 Cal.App.3d at pp. 481-482.)

The trial court’s instructions, which comported with the above-stated governing law, informed the jury: “Plaintiffs . . . claim that defendants used undue influence to overcome Claudette Monier’s free will and judgment and cause her to do things differently than she would have if permitted to follow her own inclinations. As a result, plaintiffs claim that Claudette and plaintiffs have suffered losses that they would not have suffered if Claudette had not been unduly influenced. [¶] Undue influence may involve the abuse of a confidential or fiduciary relationship. A person in a confidential or fiduciary relationship may not use another’s trust and confidence to gain an unfair advantage. You must decide whether defendants occupied a confidential or fiduciary relationship with Claudette Monier. [¶] Undue influence consists and is used by one in whom the confidence is reposed by another or who holds a real or apparent authority over him of such confidence or authority for the purpose of obtaining an unfair advantage over him, in taking an unfair advantage of another’s weakness of mind,

or in taking a grossly oppressive and unfair advantage of another's necessities or distress. [¶] In the case of testamentary instruments such as Wills and Trusts, a presumption of undue influence arises if the plaintiffs show that a defendant who is alleged to have exerted undue influence had a confidential relationship with Claudette Monier; that such defendant actively participated in procuring the preparation of the testamentary documents, the Will and/or Trust; and three, that such defendant benefited -- unduly -- that defendant unduly benefited from the execution of such documents. [¶] With regard to influencing a testamentary disposition, it must be proved that Claudette Monier's free will was overborne by the pressure of the undue influences, and that she made a disposition not in accord with her true desires. In such case, the burden shifts to defendants to prove that they did not abuse Claudette's trust and confidence and that the benefits they received were received fairly. To meet such burden, the defendants must prove that the benefits were obtained fairly and without the exertion of undue pressure or influence."

The court instructed in this fashion because plaintiffs' claims of undue influence by defendants involved a variety of contexts and were not limited to undue influence on Claudette's testamentary wishes.

Defendants argue the instructions were inadequate and the court erred in refusing their proposed instructions on undue influence, which emphasized that the undue influence must be brought to bear directly upon the testamentary act and it is not enough that the alleged undue influencer be present at the signing

of the will. According to defendants, the court's rejection of their proposed instructions was prejudicial because the direct evidence showed that Steven's only involvement in procuring the will and trust was to accompany Claudette to her second appointment with her attorney to execute the instruments.

Plaintiffs respond the court properly refused defendants' proposed instructions because the instructions given by the court correctly stated the applicable law, and defendants' instructions were repetitious and duplicative. They also assert that we need not address the claim of instructional error because plaintiffs sought to invalidate the will and trust on the grounds of fraud as well as undue influence, and defendants have raised no cognizable challenge to the jury's special findings that defendants' conduct was fraudulent. Thus, plaintiffs argue, because the judgment invalidating the will and trust may be upheld on the ground of fraud, it is of no moment if the court erred in refusing the proposed instructions regarding undue influence.

Defendants reply that at trial plaintiffs did not pursue a fraud theory with respect to invalidating the will and trust, and they cannot change their theory on appeal. Not so.

In their complaint, plaintiffs sought to invalidate the will and trust on the grounds of both undue influence and fraud. The court gave instructions on actual and constructive fraud. Plaintiffs argued that Steven and Leila were in a confidential relationship with Claudette; that defendants influenced her to distance herself from her own family and become part of the Flores "family," without revealing that Leila and Steven were

sexual partners who collaborated on writing checks on Claudette's accounts; and that Steven defrauded her by lying about forming a business with Claudette and about marrying her in order to obtain trips, credit, be named the beneficiary on life insurance policies, and other financial benefits. Plaintiffs' counsel pointed to testimony by Steven stating, "[w]hen we did the trust," and other comments concerning his preexisting knowledge of the contents of the trust to show he was aware of its terms and had participated in procuring the trust naming him as beneficiary as part of his scheme to take advantage of Claudette's assets.

The jury returned a general verdict in favor of plaintiffs. The jury also returned special findings on the general verdict determining that (1) Claudette placed her trust and confidence in Steven and Leila, (2) defendants took unfair advantage of the relationship and trust and confidence by receiving transfers of money or property by obtaining other benefits from Claudette at her expense, and (3) defendants' conduct was fraudulent. The jury found that Steven's fraud, undue influence, breach of trust, or other wrongful conduct was a substantial factor in causing Claudette to sign the trust and will naming him as successor trustee and sole beneficiary.

Plaintiffs adequately raised and pursued theories of fraud with respect to the will and trust. Fraud is a distinct ground from undue influence for invalidating the documents. (*David v. Hermann* (2005) 129 Cal.App.4th 672, 685.) Defendants do not demonstrate the absence of substantial evidence to support a verdict on the ground of actual or constructive fraud, which

would require them to set forth all the evidence and relate it to the elements of those causes of action, showing wherein the evidence is deficient. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) Having failed to do so, they cannot show any prejudice from the court's alleged error in rejecting their proposed instructions on plaintiffs' alternate theory of undue influence.

Moreover, as plaintiffs correctly assert, the court's other instructions adequately covered the requirement that alleged undue influence must be brought to bear directly upon the testamentary act.

The court instructed that "[i]n the case of testamentary instruments such as wills and trusts, a presumption of undue influence arises if the plaintiffs show that (1) a defendant who is alleged to have exerted undue influence had a confidential relationship with Claudette Monier; (2) *that such defendant actively participated in procuring the preparation of the testamentary documents (the will and/or trust);* and (3) that such defendant unduly benefited from the execution of such documents. [¶] With regard to influencing a testamentary disposition, it must be proved *that Claudette Monier's free will was overborne by the pressure of the undue influencer and that she made a disposition not in accord with her true desires.*" (Emphasis added.) The court also advised the jury that Claudette's "*execution of any will or trust documents was ineffective and invalid to the extent such execution was procured by Defendants' fraud or undue influence.*" (Emphasis added.)

The italicized language adequately explained that the undue influence must be brought to bear upon the testamentary act and that it caused the testator to make a testamentary disposition not in accordance with her true desires and free will. Therefore, the court did not err in declining to give defendants' proposed instruction. (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 685 ["[a] court may refuse a proposed instruction if other instructions given adequately cover the legal point"]; *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1678 [it is proper to refuse an instruction that unduly overemphasizes theories or defenses either by repetition or by singling them out or making them unduly prominent even though the instruction may be a legal proposition].) In any event, it is not reasonably probable that the jury would have reached a different result had defendants' proposed instructions been given. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 [*People v. Watson* (1956) 46 Cal.2d 818 standard of prejudice applies to instructional error in a civil case].)

II

Leila challenges the trial court's complete invalidation of the will and trust. She claims she is entitled to Claudette's estate as the alternate beneficiary because the jury found she did not engage in any wrongdoing in connection with the execution of the will and trust. The trial court did not err.

Claudette's pour-over will bequeathed her estate to the trustee of her trust. Under the terms of the trust, Steven was the successor trustee and, after the payment of Claudette's taxes

and debts upon her death, the balance of her estate was to be distributed as follows: "(1) STEVEN FLORES, settlor's friend, shall receive one-hundred percent (100%) of the trust estate. [¶] . . . [¶] If [Steven] has predeceased the settlor, then the share created for such beneficiary shall be distributed outright to settlor's cousin, FATTEN PABLO."

The jury found that Claudette placed her trust and confidence in Steven and Leila, who took unfair advantage of the relationship of trust and confidence, and that their conduct was fraudulent. The jury also found that their wrongful conduct was a substantial factor in causing the transfer of Claudette's money to Steven and/or Leila. But the jury did not find that both defendants exercised an undue influence over Claudette with respect to the transfer of her property to Steven under the will and trust. The jury found that Steven's wrongful conduct was a substantial factor in causing Claudette to sign the will and trust naming Steven as successor trustee and sole beneficiary, but that Leila was not a substantial factor in causing Claudette to sign the will and trust naming Steven as successor trustee and sole beneficiary.

"It is the general rule that if the whole will is the result of the presence of undue influence, the will is totally invalidated; but if only a part of the will was thus procured, that part may be rejected as void, but the remainder, which is the outcome of the testator's free will, is valid if it is not inconsistent with and can be separated from the part which is invalid." (*Estate of Molera* (1972) 23 Cal.App.3d 993, 1001; *Estate of Webster* (1941) 43 Cal.App.2d 6, 15-16; Prob. Code, § 6104 [the execution of a will

or part of a will "is ineffective to the extent the execution . . . was procured by . . . fraud, or undue influence"].)

Leila contends the jury found that the testamentary bequest to Steven was procured by his undue influence or fraud, but did not find that her wrongful conduct was instrumental in obtaining this result or that all of the terms of the will and trust resulted from Steven's wrongful conduct. Thus, she argues, only the transfer to Steven should have been invalidated, and Leila was entitled to Claudette's property pursuant to the severability clause of the trust which provided: "If any provision of this instrument is invalid, that provision shall be disregarded, and the remainder of this instrument shall be construed as if the invalid provision had not been included."

In her view, this severability clause served to eliminate the requirement that Steven predecease Leila in order for her to become Claudette's beneficiary, and had the effect of making Leila the alternate beneficiary under any circumstances that invalidated the transfer to Steven. Leila asserts her position is supported further by Probate Code section 21111, subdivision (a)(1), which states in relevant part: "[If] a transfer fails for any reason, the property is transferred as follows: [¶] . . . If the transferring instrument provides for an alternative disposition in the event the transfer fails, the property is transferred according to the terms of the instrument."

Leila's contention is not persuasive primarily because she misconstrues the effect of the special interrogatories on the general verdict.

"The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant" (Code Civ. Proc., § 624.) "A general verdict implies a finding in favor of the prevailing party of every fact essential to the support of that party's action or defense. [Citations.] And all inferences and intendments favor such a verdict. [Citations.]" (7 Witkin, Cal. Procedure (5th ed. 2008) Trial, § 341, p. 397.) A general verdict may be undermined, however, by the jury's fatally inconsistent findings on special interrogatories. (*Id.* at p. 398.)

"In all cases the court may direct the jury to find a special verdict in writing, upon all, or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. . . . Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly." (Code Civ. Proc., § 625.)

Technical inconsistencies typically are insufficient to upset a general verdict if the conflict can be resolved under any theory of the case. (See *Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 540 ["The general and special verdicts must be beyond possibility of reconciliation under any possible application of the evidence and instructions. If any conclusions could be drawn thereunder which would explain the apparent conflict, the jury will be deemed to have drawn them"], overruled on another ground in *Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at p. 574; *Weisenburg v.*

Molina (1976) 58 Cal.App.3d 478, 487; *Hudgins v. Standard Oil Co.* (1933) 136 Cal.App. 44, 51; 7 Witkin, Cal. Procedure, *supra*, Trial, § 364, pp. 423-425.)

Here, the complaint alleged that Steven's and Leila's fraud or undue influence caused or induced Claudette to execute the will and trust transferring all of her property to Steven as primary beneficiary and to Leila as contingent beneficiary. The jury returned a general verdict in favor of plaintiffs and against defendants. In its special findings on the verdict, the jury found that Claudette placed her trust and confidence in Leila, and that Leila took unfair advantage of the relationship of trust and confidence by receiving transfers of money or property, or by obtaining other benefits from Claudette. The jury also found that Leila's conduct was fraudulent. With respect to the will and trust, the special findings established only that Steven's wrongful conduct, not Leila's, caused Claudette to execute the will and trust *naming Steven* as successor trustee and sole beneficiary. The jury was not asked if either Leila's or Steven's undue influence or fraud induced Claudette *to name Leila* as a contingent beneficiary in the event Steven predeceased Claudette. Hence, nothing in the special findings undermine or conflict with the general verdict against Leila.

Even if the special findings on the general verdict are interpreted more broadly as finding that Leila did nothing to induce Claudette to execute the will and trust, rather than simply finding that she did nothing to induce Claudette to leave her estate to Steven, this is of no assistance to Leila because

the similarly worded special findings against Steven must be interpreted equally broadly. In other words, the finding that Steven's fraud or undue influence caused Claudette to execute the will and trust naming him as successor trustee and sole beneficiary must be construed as a finding that his fraud or undue influence caused her to execute the two documents in toto; i.e., no portion of the documents were the result of Claudette's free will, and they must be invalidated in their entirety.

(*Estate of Molera, supra*, 23 Cal.App.3d at p. 1001; *Estate of Webster, supra*, 43 Cal.App.2d at pp. 15-16; Prob. Code, § 6104.)

This is particularly appropriate given the evidence regarding Steven's and Leila's sexual relationship and the jury's express findings regarding their wrongful conduct in defrauding Claudette of other property. (Compare, *Estate of Stauffer* (1956) 142 Cal.App.2d 35, 40-42 [appellate court invalidated the portion of decedent's will leaving money to Philpot, who was found to have exercised undue influence over the decedent, but did not invalidate the residuary clause leaving the remainder of the estate to Wollenberg and Snyder when the circumstances did not lend themselves to a determination that Philpot's undue influence tainted the bequests to Snyder and Wollenberg, who were innocent of any wrongdoing].)

Under the circumstances, the trial court did not err in invalidating the entire will and trust.

III

Defendants claim the court committed prejudicial error in refusing to give defendants' requested instruction stating:

"There is no specific regulation or professional licensing requirement for massage therapy. Unlike doctors' and psychotherapists' relationships with their patients, there are no statutory ethical requirements limiting massage therapists from romantic involvement, receiving gifts of money or property, or from being named beneficiary to a client's will or trust." According to defendants, this instruction was necessary to counteract plaintiffs' evidence and instructions regarding Steven's alleged practice of psychotherapy.

The jury was instructed in accordance with Business and Professions Code section 2902, subdivision (c) that a person represents himself as a psychologist when he holds himself out to the public by any description of services incorporating certain words, including "psychologist," "psychometry," or "psychotherapist," or when the person holds himself out as an expert in the field of psychology. The jury was told that no person may engage in the practice of psychology or represent himself to be a psychologist without a license. Duly ordained members of recognized clergy could do work of a psychological nature consistent with the laws governing their profession, but they could not hold themselves out to the public by any description of services incorporating the words "psychological," "psychologist," "psychology," "psychometrist," "psychometrics," or "psychometry" and they could not imply they were licensed to practice psychology.

The court also instructed in the language of Business and Professions Code section 2903 that the practice of psychology is

"defined as rendering or offering to render for a fee . . . any psychological service involving the application of psychological principles, methods, and procedures of understanding, predicting, and influencing behavior, such as the principles pertaining to learning, perception, motivation, emotions, and interpersonal relationships; and the methods and procedures of interviewing, counseling, psychotherapy, behavior modification, and hypnosis [¶] The application of these principles and methods includes, but is not restricted to: diagnosis, prevention, treatment, and amelioration of psychological problems and emotional and mental disorders of individuals and groups. [¶] Psychotherapy within the meaning of this chapter means the use of psychological methods in a professional relationship to assist a person or persons to acquire greater human effectiveness or to modify feelings, conditions, attitudes and behavior which are emotionally, intellectually, or socially ineffectual or maladjustive. [¶] As used in this chapter, 'fee' means any charge, monetary or otherwise . . . for services rendered."

In addition, the court instructed the jury that under the Psychology Licensing Law, "unprofessional conduct includes, but is not limited to: [¶] (1) the commission of any dishonest, corrupt, or fraudulent act; [¶] (2) Any act of sexual abuse, or sexual relations with a patient or former patient within two years following termination of therapy, . . . [¶] (3) Functioning outside of his or her particular field or fields of competence as established by his or her education, training, and experience."

Plaintiffs presented evidence that Claudette began seeing Steven in 2000 for paid therapy sessions which included not only massage therapy but other forms of physical, mental, emotional, and spiritual counseling and "healing," using what Claudette referred to as Steven's special power. Steven's business card indicated he performed massage, Reiki, hypnotherapy, past life regression, psychometry, and eternal life activation. Steven counseled Claudette concerning her interpersonal relationships. For example, he advised her that it was not good for her to be around her family because they had "bad energy." He said that her mother was an "emotional vampire" who "was sucking the life out of everyone around her." Claudette told friends and family that Steven was helping her to find peace through cleansing the past using past life regression, hypnosis and/or deep relaxation techniques, and by recommending certain psychological writings and tapes.

When Steven's business relationship with Claudette transformed into an intimate one, Steven claimed that he began charging her only sporadically for his healing work; however, he accepted gifts of property, money, and travel or purchased property from Claudette at less than fair market value.

Plaintiffs' experts, Dr. David Stewart and Dr. David Spiegel, testified that a person who advertises himself as a practitioner of hypnotherapy and psychometry, charges a fee, and provides advice concerning a client's life, family dynamics, interpersonal relationships, and improving behavior would be considered to be offering psychotherapy services and involved in a psychotherapeutic

relationship. According to Dr. Stewart, it would be unethical for a person holding himself out as a practitioner of psychology to receive gifts or engage in financial transactions with a patient, travel or go on vacations with a patient, serve as a trustee, or be designated as a beneficiary for a patient. Dr. Spiegel added that it would be unethical to date a patient because this would take advantage of the patient's vulnerability. Both doctors stated that when a person is in a deep state of relaxation or hypnosis, the brain's critical thinking and judgment functions are suspended or impaired, and the person is highly susceptible to suggestion and influence. Plaintiffs' counsel argued that under the circumstances, Steven had a higher fiduciary duty to Claudette because of the nature of his relationship with her.

Defendants do not claim that the court erred in allowing the introduction of plaintiffs' evidence, in giving the instructions concerning the practice of psychotherapy and a psychotherapist's ethical duties, or in permitting plaintiffs to pursue the theory that, by acting as a psychotherapist, Steven was governed by a psychotherapist's ethical and fiduciary obligations to his clients. Defendants also do not present a cognizable challenge to the sufficiency of the evidence supporting a finding that Steven was engaging in conduct that equated with holding himself out as a psychotherapist. Perhaps this is because they realize the jury was entitled to reject Steven's testimony that he merely forgot to update his business card and he no longer practiced hypnotherapy, past life regression, or psychometry.

Defendants simply argue that because they presented evidence that Steven was only a massage therapist and not a psychotherapist, the court prejudicially erred in failing to give their requested instruction. They assert that, under the circumstances here, it was incumbent on the trial court to instruct the jury that massage therapists do not have the same ethical and fiduciary obligations as psychotherapists. We disagree.

"A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him [or her that] is supported by substantial evidence. The trial court may not force the litigant to rely on abstract generalities, but must instruct in specific terms that relate the party's theory to the particular case. [Citations.]" (*Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at p. 572 (hereafter *Soule*).) "A reviewing court must review the evidence most favorable to the contention that the requested instruction is applicable [because] the parties are entitled to an instruction thereon if the evidence so viewed could establish the elements of the theory presented. [Citation.]" (*Christian v. Bolles* (1970) 7 Cal.App.3d 408, 415-416; accord, *Norman v. Life Care Centers of America, Inc.* (2003) 107 Cal.App.4th 1233, 1242 (hereafter *Norman*).)

An instructional error is prejudicial in a civil case only if it is reasonably probable the appellant would have received a more favorable result in the absence of the error. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; *Soule*, *supra*, 8 Cal.4th at p. 570; *Norman*, *supra*, 107 Cal.App.4th at pp. 1248-1249.) The determination of prejudice depends heavily on "the particular

nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury."

(*Soule, supra*, 8 Cal.4th at p. 580.) In deciding whether an error of instructional omission was prejudicial, the reviewing court must evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." (*Soule, supra*, 8 Cal.4th at pp. 580-581.)

Here, the relevant question was whether Steven acted as a psychotherapist in his relationship with Claudette, or whether he was only her massage therapist, friend, and lover. If the jury found that Steven was the former, then the laws applicable to psychotherapists governed his behavior. But if the jury found the latter, then these laws did not apply. Given that none of plaintiffs' evidence or arguments demonstrated that massage therapists who are acting solely as massage therapists--and not as psychotherapists--are subject to a higher duty of care, it was unnecessary for the court to instruct that massage therapists are not held to the same duty as psychotherapists. In any event, under the test enunciated in *Soule*, it is not reasonably probable that the jury would have reached a more favorable result had the instruction been given.

IV

In addition to finding that Leila was unjustly enriched in the amount of \$360,000 and that Steven was unjustly enriched in the amount of \$1,100,000 by reason of their fraud or undue influence, the jury also found that Claudette's estate suffered

damages of \$10,000 as the result of Leila's negligence and \$300,000 as the result of Steven's negligence. Defendant unsuccessfully challenged the negligence cause of action via a demurrer, motion for judgment on the pleadings, and motion for nonsuit. On appeal, they contend plaintiffs failed to establish defendants' liability for negligence. In defendants' view, this is nothing more than an action for undue influence and fraud and, because the jury found defendants liable on those grounds, it is inconsistent to permit recovery on negligence grounds and it results in an impermissible double recovery. Furthermore, they argue, the economic loss rule prevents plaintiffs from recovering purely economic losses in a negligence action. Defendants posit: "To hold otherwise would be to open a [P]andora's box of seemingly endless potential liability for purely economic losses occasioned by negligent advice or assistance given by lovers, friends and relatives."

We need not address all of defendants' challenges to the negligence verdict. This is so because one challenge is persuasive.

Defendants assert that plaintiffs presented inconsistent alternate theories to the jury but their main "theory of the case was that Steven and Leila were grifters, who intentionally insinuated themselves into Claudette's personal life and her finances over a period of years, taking advantage of her and leaving her virtually without assets and in debt. The jury accepted this theory, as reflected in its special verdicts." Therefore, defendants argue, once the jury found that they acted

intentionally and awarded damages for their unjust enrichment, it could not also award damages based on defendants' negligence because conduct cannot be both intentional and negligent.

For the reasons that follow, we agree.

According to the negligence allegations of plaintiffs' complaint, defendants had undertaken to care for Claudette's person and property, and to provide counsel and assistance to Claudette and her estate regarding her financial, mental, emotional, and spiritual well-being. Defendants breached their duty to exercise due care and "so carelessly advised, counseled, supervised, directed, controlled, invested, managed, and manipulated Claudette's person and property as to proximately and legally cause injury, damage and detriment to Claudette, her Estate and Plaintiffs" in the form of "economic and noneconomic harm."

Defendants moved for nonsuit on the ground that plaintiffs could not pursue a negligence action for any of Claudette's physical injuries, and could not recover for negligent infliction of emotional distress. Plaintiffs responded they could maintain an action for the negligent damage to Claudette's economic position. Indeed, in his argument to the jury, plaintiffs' counsel asserted that plaintiffs were not seeking any damages for Claudette's death or for emotional distress. He suggested the issue of defendants' negligence was simply an alternate legal theory in case the jury did not find that defendants acted intentionally. Counsel stated: "There are also a couple of questions [on the special findings verdict form] about negligence on the theory that if you believe

that this was an accident, that this program wasn't engineered, that Claudette wasn't targeted when [Leila] who had never been close to her before went over to work at the deli, then it's at least carelessness about somebody's economic and physical and emotional welfare."

The jury instructions stated plaintiffs sought restitution for the value of money, goods, and services defendants obtained from Claudette via direct transfers, her credit, or the equity in her home, and any amounts by which defendants were unjustly enriched as the result of defendants' fraud, undue influence, or other wrongful conduct.

The jury found that Claudette placed her trust and confidence in Steven and Leila, that they took unfair advantage of the relationship of trust and confidence by receiving transfers of money or property or by obtaining other benefits from Claudette at her expense, and that defendants' conduct was fraudulent.

With respect to Leila, the jury found that her fraud, undue influence, breach of trust, or other wrongful conduct was a substantial factor in causing her to gain life insurance benefits from West Coast Life Insurance Company, and "in causing defendants Steven Flores and/or Fatten 'Leila' Pablo to obtain transfers of [Claudette's] money to defendant Steven Flores and/or Fatten 'Leila' Pablo."

As for Steven, the jury found that his fraud, undue influence, breach of trust, or other wrongful conduct was a substantial factor (1) in causing Claudette to sign the will and trust naming him sole beneficiary and successor trustee; (2) in causing Claudette to

transfer an interest in her Roseville home to Steven; (3) in causing Steven to obtain life insurance benefits from policies with Fidelity, Valley Forge, Globe, and Balboa; (4) in causing Steven to gain the proceeds of loans secured by Claudette's property; (5) in causing Steven to obtain possession or ownership of Claudette's Subaru Forester; (6) in causing Steven, Leila, or Eulalio to obtain possession or control of Claudette's Lexus; and (7) in causing Steven to obtain transfers of Claudette's money.

The jury determined that Leila and Steven were unjustly enriched in the sums of \$360,000 and \$1,100,000, respectively, by reason of their aforementioned fraud, undue influence, violation of trust, and other wrongful acts. The jury also found that defendants were negligent, that their negligence was a substantial factor in causing harm to Claudette, and that her estate suffered \$10,000 in damage as the result of Leila's negligence and \$300,000 as the result of Steven's negligence. But there are no special findings indicating the harm Claudette suffered as the result of defendants' negligence.

On appeal, plaintiffs do not explain how defendants' conduct could be considered both negligent and intentional. Their theory at trial was that defendants intentionally divested Claudette of her financial resources, and they specifically argued that their theory of negligence was only an alternate theory of recovery. Plaintiffs do not attempt to differentiate between any of defendants' conduct toward Claudette to show that some of it was negligent and some intentional. Plaintiffs do not specify what other harm Claudette suffered from defendants' negligence in

addition to the harm the jury found was caused by defendants' fraud and undue influence. And plaintiffs do not point to evidence which would support a determination that their negligent conduct harmed her in the amounts of \$10,000 and \$300,000. They simply contend the negligence verdict should be affirmed because Steven was acting as Claudette's psychotherapist and it is negligence per se when a person violates a statute, such as the one requiring a person be licensed to practice psychotherapy.

Besides failing to address how this demonstrates Leila's negligence--given there was no evidence that Leila acted as Claudette's psychotherapist--plaintiffs' explanation also fails to link Steven's alleged negligence to any damages not covered by the jury's fraud and undue influence award. Plaintiffs are not entitled to a double recovery for the same injury and may not recover for damages that are speculative. The jury awarded damages for purely economic losses, not for pain and suffering, emotional distress, or wrongful death. Because plaintiffs have not pointed to specific items of economic harm that support the figures awarded by the jury and are not encompassed within the fraud and undue influence award, the damage awards of \$300,000 and \$10,000 for Steven's and Leila's negligence must be reversed.

V

Defendants raise various challenges to the compensatory damages awards. They contend that the jury awarded plaintiffs a double recovery against Eulalio and against Steven and Leila, and that the jury ignored the court's instructions in calculating the compensatory damage award against Leila.

In plaintiffs' view, the contentions are forfeited because defendants failed to obtain a ruling on their motion for new trial, which was denied by operation of law when defendants were unable to calendar the matter within 60 days from the date they brought the motion. Plaintiffs' argument is not persuasive.

Ordinarily, the failure to move for a new trial precludes a party from arguing on appeal that damages were excessive or inadequate. This is so because the trial court is in a better position to determine whether a verdict was influenced by passion or prejudice, and has the power to weigh the evidence and resolve issues of credibility. (*Zaxis Wireless Communications, Inc. v. Motor Sound Corp.* (2001) 89 Cal.App.4th 577, 581 (hereafter *Zaxis*).) However, "the merits of a motion for a new trial denied by operation of law [that is, by expiration of the 60-day time period] may be reviewed upon appeal in the same manner as if expressly denied by the court." [Citations.] This is true even where the appellant has caused the failure to have the motion heard within 60 days [citations] or the motion is based on affidavits that the trial court did not pass on [citations]." (*In re Marriage of Liu* (1987) 197 Cal.App.3d 143, 152-153, fns. omitted.)⁴ Moreover, the failure to move for a new trial

⁴ Arguing that *In re Marriage of Liu*, *supra*, 197 Cal.App.3d 143 and the cases cited therein are "bad law," plaintiffs urge us to apply the rule in *Zaxis*, *supra*, 89 Cal.App.4th 577. But *Zaxis* simply held that the failure to bring a motion for new trial forfeited the issue of excessive damages on appeal; it did not address the situation where a party pursued a motion for new trial, which was then denied by operation of law. Cases are not

"does not preclude a party from urging legal errors in the trial of the damage issue such as erroneous rulings on admissibility of evidence, errors in jury instructions, or failure to apply the proper legal measure of damages." (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 122; accord, *Christiansen v. Roddy* (1986) 186 Cal.App.3d 780, 789-790.)

In sum, defendants' contentions are not forfeited because they were raised in a motion for new trial and, in any event, some of them concern the failure to apply the correct legal measure of damages.

A

The jury found that Leila's fraud, undue influence, or other wrongful conduct "was a substantial factor in causing [her] to gain life insurance benefits from West Coast Life Insurance Company," and in causing Leila "to obtain transfers of Claudette Monier's money to [Steven] and/or [Leila]." It specifically found Leila's wrongful conduct was not a substantial factor in causing Claudette (1) to sign the will and trust in favor of Steven, (2) to transfer an interest in her home to Steven, (3) to make Steven the beneficiary of the remaining life insurance policies, or (4) to transfer the Subaru and Lexus to defendants. Furthermore, it found Leila did not wrongfully exercise possession or control over Claudette's personal property. The jury awarded plaintiffs

authority for propositions not considered therein. (*Murphy v. City of Alameda* (1992) 11 Cal.App.4th 906, 914.)

damages of \$360,000 based on Leila's unjust enrichment as the result of her fraud and/or undue influence.

Leila contends the jury must have disregarded the court's express instruction that she had not received the West Coast Insurance proceeds of \$350,000, and then included this amount in its calculation of damages because all she received from Claudette was a \$3,000 down payment on a Honda Civic, some free travel, and some money in an unidentified amount, which is significantly less than \$360,000. Plaintiffs tried to show that Leila had received \$50,694 from Claudette, by demonstrating Leila had deposited this much over her payroll income into her bank account. But their calculations were shown to be wrong, and the record establishes only that she deposited "thousands of dollars over her payroll" into her account. According to Leila, there is no substantial evidence that she was unjustly enriched in the amount of \$360,000, which means the jury must have included the West Coast policy proceeds even though she did not receive them.

Although it is appropriate to require Leila to give plaintiffs the West Coast insurance proceeds if she ever receives the money, it is not appropriate to require her to pay damages in the amount of the policy regardless of whether she ever receives the death benefits. (*Lueter v. State of California* (2002) 94 Cal.App.4th 1285, 1302 ["damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery"]; *Agnew v. Parks* (1959) 172 Cal.App.2d 756, 768 [damage depending on the act of a third person or the happening of a certain event is speculative].)

While plaintiffs believe that ample evidence supports the verdict, they fail to point to specific evidence which would permit us to determine that Leila was unjustly enriched in the amount of \$360,000 or any specific amount. They argue that Steven used his insurance policy proceeds to pay his and Leila's attorney fees and that this unjustly enriched Leila. However, Steven's payment of attorney fees using money the jury expressly found was not obtained as the result of Leila's wrongful conduct cannot be part of the unjust enrichment calculation against Leila. Moreover, the verdict against Steven requires him to pay the insurance proceeds as damages to plaintiffs, and they are not entitled to recover the proceeds twice.

Consequently, we must reverse the unjust enrichment award of \$360,000 against Leila and remand the matter to the trial court for further proceedings to determine the appropriate amount of damages.

B

Eulalio challenges the remedy afforded plaintiffs for his conversion of Claudette's Lexus automobile, claiming it results in a double recovery.

Claudette bought the Lexus for \$48,465 in 2001 after she sold or gave her Subaru Forrester to Steven. Plaintiffs asserted that Eulalio converted the Lexus for his own use. Defendants disagreed. Steven claimed that while Claudette was recovering from her injuries following her first accident in March 2004, he borrowed money from Eulalio to pay for their bills. Claudette gave Eulalio the Lexus as reimbursement, and Steven registered the

car in his and Eulalio's names, stating under penalty of perjury that they paid \$5,000 for it. However, Eulalio testified that Claudette had never been indebted to him and that he purchased the Lexus from Claudette for a lump sum payment of \$18,000.

The court instructed the jurors on the elements of conversion, and also advised them that plaintiffs sought to recover the value of any cars transferred from Claudette to defendants. The jurors did not believe defendants' conflicting explanations for how Eulalio acquired the car, and awarded plaintiffs damages of \$12,500 for Eulalio's wrongful exercise of possession or control over the Lexus. Thereafter, the trial court entered a money judgment plus interest for a total of \$26,704.37.

This portion of the judgment comports with the applicable measure of damages for the conversion of personal property, which is set forth in Civil Code section 3336: "The detriment caused by the wrongful conversion of personal property is presumed to be: [¶] First--The value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted; and [¶] Second--A fair compensation for the time and money properly expended in pursuit of the property."

"Although the first part of section 3336 appears to provide for alternative measures of recovery, the first of the two measures, namely the value of the property converted at the time and place of conversion with interest from that time, is generally considered

to be the appropriate measure of damages in a conversion action. [Citations.] The determination of damages under the alternative provision is resorted to only where the determination on the basis of value at the time of conversion would be manifestly unjust. [Citations.]” (*Myers v. Stephens* (1965) 233 Cal.App.2d 104, 116.)

In other words, “where proof establishes an injury beyond that which would be adequately compensated by the value of the property and interest, the court may award such amounts as will indemnify for all proximate reasonable loss caused by the wrongful act.” (*Lint v. Chisholm* (1981) 121 Cal.App.3d 615, 624-625.) For example, where the converted property has increased in value, damages based on the property’s value at the time of conversion would be manifestly unjust. To prevent the tortfeasor from profiting from his or her wrongdoing, courts have permitted the recovery of net profits in addition to the value of the property at the time of conversion. (Johns, *California Damages: Law and Proof* (5th ed. 1997) § 7.2(b), p. 7-4.) And “[w]here damages for loss of use exceed the legal rate of interest, it is appropriate to award the former, but not both.” (*Lint v. Chisholm, supra*, 121 Cal.App.3d at pp. 624-625; Johns, *California Damages, supra*, § 7.3, pp. 7-5 to 7-6.)

Here, there is no evidence that the Lexus increased in value rather than depreciated. Nor is there any evidence that damages for loss of use exceed the legal rate of interest. Accordingly, the appropriate measure of damages is the value of the Lexus, which the jury determined was \$12,500, plus the interest calculated by the court. However, in addition to awarding plaintiffs their

damages, the court directed that Eulalio was an involuntary trustee of the Lexus, which he was required to restore to plaintiffs.

Eulalio argues the judgment gives plaintiffs an impermissible double recovery because it awards them damages for the value of the Lexus plus interest, but also requires him to return the car. He asserts that plaintiffs elected to pursue damages in the amount of the value of the car, as evidenced by the jury instructions, and, having made such an election, plaintiffs cannot have the value of the car in addition to specific recovery of the property. We agree.

The general rule of compensatory damages bars double recovery for the same wrong. In an action for conversion, the plaintiff's damages must be reduced if the defendant returns the property or the plaintiff otherwise recovers the property. (*Krusi v. Bear, Stearns & Co.* (1983) 144 Cal.App.3d 664, 673; see generally 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1630, p. 1144.) Thus, if Eulalio returns the car, the judgment against him must be reduced by the value of the car at the time it is returned; if he pays the money judgment in full, plaintiffs cannot have the car.

Plaintiffs argue they are entitled to recover the Lexus and receive money for the rental value of the car. But plaintiffs did not pursue an action for specific recovery of the property, such as claim and delivery or replevin, which could entitle them to a return of the personal property plus loss of use. (Code Civ. Proc., §§ 512.010 et seq., 627, 667; Johns, California Damages, *supra*, §§ 7.6-7.7, pp. 7-7 to 7-8.) They pursued an action for

conversion. The remedy for conversion is typically the value of the property at the time it was converted, plus interest, rather than recovery of possession of the property. (Johns, California Damages, *supra*, §§ 7.1-7.2(a), pp. 7-2 to 7-3.) Plaintiffs fail to refer us to any legal authority demonstrating that the appropriate measure of damages in a conversion action is recovery of the property plus damages for rental value. Nor do they point to any evidence in the record that they asked the jury to recompense them for the rental value of the Lexus, and that they submitted supporting evidence from which to calculate the rental value. Rather, they asked to recover the value of the car. It is too late to change their theory on appeal.

Accordingly, plaintiffs are entitled only to the value of the Lexus plus interest, which amount must be reduced by the present value of the car if Eulalio returns it to them. And, as we shall explain in part V(C), if plaintiffs recovered their damages from Eulalio, they cannot obtain the car from him in satisfaction of the judgment because this will result in a double recovery.

The appellate record indicates that Eulalio has satisfied at least a portion of the judgment by paying plaintiffs \$12,500, and that he has also returned the Lexus. We do not know if he has paid the interest owed as ordered in the judgment. Defendants ask us to vacate the judgment against Eulalio, with directions to conduct a hearing to determine the status of plaintiffs' efforts to enforce the judgment against him, to order restitution to him of any amounts or assets necessary to prevent a double recovery by plaintiffs, and to enter a new judgment consistent with the

prohibition against a double recovery of damages. We agree this is the appropriate solution under the circumstances presented.

C

Steven and Leila contend the judgment gives plaintiffs an impermissible double recovery because it not only awards plaintiffs damages for the value of the cars, insurance proceeds, and property that they obtained at Claudette's expense, but it also imposes a constructive trust that makes them involuntary trustees of the aforementioned property and requires them to transfer it to plaintiffs.

"A constructive trust is an involuntary equitable trust created by operation of law as a remedy to compel the transfer of property from the person wrongfully holding it to the rightful owner. [Citations.] The essence of the theory of constructive trust is to prevent unjust enrichment and to prevent a person from taking advantage of his or her own wrongdoing." (*Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal.App.4th 980, 990.)

The circumstances under which constructive trusts are imposed are set forth in Civil Code sections 2223 and 2224. Section 2223 provides: "One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner." Section 2224 states: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

Under these statutes and relevant case law, a constructive trust may be imposed only where the following three conditions are satisfied: "(1) the existence of a res (property or some interest in property); (2) the right of a complaining party to that res; and (3) some wrongful acquisition or detention of the res by another party who is not entitled to it." (*Communist Party v. 522 Valencia, Inc.*, *supra*, 35 Cal.App.4th at p. 990, italics omitted.)

A constructive trust is an alternative remedy to the recovery of a money judgment, and a plaintiff cannot recover both a money judgment and a decree imposing a constructive trust. (12 Miller & Starr, Cal. Real Estate (3d ed. 2001) Remedies, § 34.116, p. 391.) Rather, the plaintiff must make an election of remedies.⁵

"In its 'conventional form,' the doctrine of election of remedies 'is stated as follows: Where a person has two concurrent remedies to obtain relief on the same state of facts, and these remedies are inconsistent, he must choose or elect between them; and if he has clearly elected to proceed on one, he is bound by this election and cannot thereafter pursue the other. 'Election of remedies has been defined to be the right to choose or the act of choosing between different actions or remedies where plaintiff has

⁵ "A constructive trust is '[t]he usual theory' upon which a plaintiff recovers wrongfully acquired assets. Only where the constructive trustee has dissipated the fund that would constitute the res of the constructive trust is it proper to award a judgment for money damages. (*St. James Armenian Church of Los Angeles v. Kurkjian* (1975) 47 Cal.App.3d 547, 553.)" (*Heckmann v. Ahmanson* (1985) 168 Cal.App.3d 119, 134.)

suffered one species of wrong from the act complained of. Broadly speaking, an election of remedies is the choice by a plaintiff to an action of one of two or more coexisting remedial rights, where several such rights arise out of the same facts, but the term has been generally limited to a choice by a party between inconsistent remedial rights, the assertion of one being necessarily repugnant to or a repudiation of the other.” [Citation.]’ [Citation.]” (*Denevi v. LGCC, LLC* (2004) 121 Cal.App.4th 1211, 1218, italics omitted.)

The election of remedies doctrine, which is based on equitable estoppel, “generally holds that if a plaintiff elects a particular remedy in lieu of an alternative and inconsistent remedy and thereby gains an advantage to the detriment of the defendant, the plaintiff thereafter is precluded from pursuing the alternative remedy.” (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 759.) Conversely, the “doctrine ordinarily does not preclude a plaintiff who has pled alternative remedies from changing his or her election before the defendant has suffered an injury from the prior election through the application of res judicata or a satisfaction of judgment.” (*Ibid.*)

Accordingly, a plaintiff usually cannot be compelled to make an election prior to judgment, and an election should not be compelled prior to satisfaction of judgment, unless the plaintiff has gained some other benefit that would make it inequitable to permit continued pursuit of an otherwise available remedy.

(*Denevi v. LGCC, LLC, supra*, 121 Cal.App.4th at p. 1221.) It

is the acceptance of an actual benefit from an alternative theory that renders continued pursuit of the alternative unfair and constitutes an election. (*Smith v. Golden Eagle Ins. Co.* (1999) 69 Cal.App.4th 1371, 1375-1376; accord, *Datig v. Dove Books, Inc.* (1999) 73 Cal.App.4th 964, 983, fn. 19.)

Here, the judgment awarded plaintiffs money damages in the amount by which Steven and Leila were unjustly enriched as a result of their fraudulent conduct which, the jury found, was a substantial cause in one or both defendants' receipt of Claudette's money, personal property, life insurance proceeds, loan proceeds, automobiles, and estate. The judgment also decrees that Steven and Leila are involuntary trustees of all the aforementioned property, for the benefit of plaintiffs, and directs Steven and Leila to transfer the property to plaintiffs. Plaintiffs may not have both remedies and will need to make an election.

Plaintiffs claim they are entitled to recover any and all property in the hands of defendants and are concurrently entitled to damages for their loss of use of the property. They assert they need not elect between equitable remedies and damages because they suffered different injuries and are entitled to both remedies. However, they also assert that once they have recovered their damages in full "through any means authorized under California law, including recording an abstract of judgment, levying on bank accounts, garnishing wages, and enforcing the constructive trust," they cannot recover the same damages again as this would result in a double recovery. Once they recover the damage award, they

"will cease efforts to collect damages"; but until then, they are entitled to pursue all available avenues of collection.

It is not clear (1) whether plaintiffs are acknowledging they are entitled to the damages awarded for defendants' unjust enrichment as the result of defendants' fraudulent acquisition of Claudette's property, but are not entitled to the full amount of damages in addition to the fraudulently obtained property; or (2) whether they think they are entitled to both damages and the property and will not consider the judgment satisfied until they have received both. If it is the former, the judgment must be clarified to reflect this. If it is the latter, plaintiffs must point to evidence in the record showing that the two remedies they seek are not duplicative and to legal authority supporting their claim of entitlement. They have not done so.

Therefore, we agree with defendants that the judgment must be vacated with directions to the trial court to conduct a hearing to determine the status of plaintiffs' efforts to enforce the judgment, to order restitution of any amounts necessary to prevent a double recovery, and to enter a new judgment that does not permit plaintiffs to receive a double recovery.

VI

The jury awarded plaintiffs punitive damages of \$1 million against Steven and \$100,000 against Leila pursuant to Civil Code section 3294, subdivision (a), which permits an award of punitive damages "for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice."

An award of punitive damages hinges on three factors: the reprehensibility of the defendant's conduct; the reasonableness of the relationship between the award and the plaintiff's harm; and, in view of the defendant's financial condition, the amount necessary to punish him or her and discourage future wrongful conduct. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 110 (hereafter *Adams*); *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928 & fn. 13.)

Defendants challenge the third factor. Relying on *Adams*, they contend the punitive damage awards must be reversed because plaintiffs failed to present any meaningful evidence of defendants' financial condition. We agree.

A punitive damage award "can be so disproportionate to the defendant's ability to pay that the award is excessive for that reason alone." (*Adams, supra*, 54 Cal.3d at p. 111, italics omitted.) The purpose of punitive damages "is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Id.* at p. 112.) Hence, "an award of punitive damages cannot be sustained on appeal unless the trial record contains meaningful evidence of the defendant's financial condition." (*Id.* at p. 109.) "Without such evidence, a reviewing court can only speculate as to whether the award is appropriate or excessive." (*Id.* at p. 112.) The plaintiff bears the burden of proving the defendant's financial condition. (*Id.* at pp. 119-123.)

Although net worth is the most common measure of the defendant's ability to pay, it is not the exclusive one. (*Baxter*

v. Peterson (2007) 150 Cal.App.4th 673, 680 (hereafter *Baxter*); *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 621, 624-625.) There is no rigid standard for measuring the ability to pay. (*Adams, supra*, 54 Cal.3d at p. 116, fn. 7.) However, "[i]n most cases, evidence of earnings or profit alone are not sufficient 'without examining the liabilities side of the balance sheet.' [Citations.] 'What is required is evidence of the defendant's ability to pay the damage award.' [Citation.] Thus, there should be some evidence of the defendant's actual wealth. Normally, evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income." (*Baxter, supra*, 150 Cal.App.4th at p. 680; *Robert L. Cloud & Associates, Inc. v. Mikesell* (1999) 69 Cal.App.4th 1141, 1152 ["evidence of the profits wrongfully gained by the defendant is inadequate as it gives only the assets without the liabilities"].)

We review the award of punitive damages for substantial evidence. (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 916.) Our review discloses that substantial evidence of defendants' financial conditions and ability to pay is lacking.

According to the evidence in the appellate record, Steven received approximately \$2,100 a month in social security disability payments, supplemented by an unidentified amount of sporadic earnings from his massage and healing business. When Leila was employed, she earned \$600 to \$700 biweekly. Plaintiffs argue that Leila also owned the Honda Civic she obtained with Claudette's money and that, at some point in time, her "bank records showed thousands of dollars of unexplained deposits." As for Steven,

plaintiffs assert that he held title to Claudette's house in Roseville worth approximately \$250,000; he held title jointly with Eulalio to a \$23,000 Lexus obtained from Claudette and title to a GMC truck; he deposited \$152,147 into his Wells Fargo account during his relationship with Claudette; he received over \$12,000 from the sale of Claudette's gold; and he received \$1,047,000 in life insurance proceeds.

In other words, to establish defendants' financial condition, plaintiffs rely primarily on the property that defendants will have to disgorge under the terms of the compensatory damage award--which means the property is unavailable to pay punitive damages. (Cf. *Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 608, fn. 6.) Plaintiffs point to no other evidence of Leila's or Steven's financial condition at the time of trial, or refer to any portion of the record wherein evidence of defendants' current incomes and liabilities was presented to the jury in conjunction with any type of discussion of defendants' net worth or ability to pay punitive damages.

As discussed above, evidence of earnings or profit alone without evidence of expenses is insufficient to establish a defendant's ability to pay punitive damages. (*Baxter, supra*, 150 Cal.App.4th at p. 680; *Robert L. Cloud & Associates, Inc. v. Mikesell, supra*, 69 Cal.App.4th at p. 1152.) Without meaningful evidence of the defendant's financial condition, a reviewing court can only speculate as to whether a punitive damage award is appropriate or excessive, and it cannot be sustained. (*Adams, supra*, 54 Cal.3d at pp. 109, 112.) Under the circumstances, we

must reverse the \$100,000 and \$1 million punitive damage awards against Leila and Steven, respectively.

When a punitive damage award is based on insufficiency of the evidence and when, as here, plaintiffs had “a full and fair opportunity” to present their case for punitive damages, retrial of the issue is barred. (*Baxter, supra*, 150 Cal.App.4th at p. 681; *Kelly v. Haag, supra*, 145 Cal.App.4th at pp. 919-920.) Accordingly, the punitive damage awards must be reversed, and we will not remand those matters for retrial.

VII

Turning to the appeal in case No. C056348, plaintiffs contend the trial court erred in denying their motion for an order to enforce the judgment against Steven by directing Steven’s attorney, John Henderson, to account for all attorney fee payments traceable to life insurance proceeds on which the court had imposed a constructive trust.

Steven paid his attorney, John Henderson, approximately \$532,000 in attorney fees, which represented a 40 percent contingency fee for Henderson’s assistance in recovering life insurance death benefits from two recalcitrant insurance companies, and approximately \$110,000 to \$123,000 in hourly attorney fees for Henderson’s time defending Steven and Leila against plaintiffs’ lawsuit. It appears that Valley Forge and Fidelity denied Steven’s claims as beneficiary of the \$250,000 and \$1 million policies because they were in effect less than two years. On December 16, 2005, Valley Forge settled Steven’s claim for \$200,000. Fidelity settled Steven’s claim for \$825,000 and paid him on July 10, 2006.

Both checks were made jointly payable to Steven and Henderson. Henderson deposited the checks into his client trust account, paid a portion to Steven, and retained a portion for his attorney fees.

Thereafter, the jury returned its verdicts, and the court made an interim order from the bench on September 6, 2006, which imposed a constructive trust on the insurance proceeds and the real and personal property acquired by defendants. On September 22, 2006, the court entered judgment on the verdicts. In addition to requiring Steven to pay damages of \$2,400,000, the judgment provides that Steven "is an involuntary trustee" of specific items of real and personal property for the benefit of Michelle in her capacity as special administrator of Claudette's estate. The enumerated items include "[a]ny and all proceeds or payments of insurance benefits paid, transferred or obtained under or pursuant to" the Valley Forge, Fidelity, Globe, and Balboa life insurance policies.

The judgment provides further that Steven "and any and all persons acting as [his] agents, servants, or employees, and all persons acting in concert with or on behalf of Steven [] are hereby ordered enjoined and/or restrained as follows: [¶] . . . [¶] c. From alienating, controlling, managing[,] disposing of, removing, conveying, hiding, secreting, moving, using, occupying, living in, entering, profiting from, receiving earnings or rent from, pledging, mortgaging, encumbering, leasing, renting, wasting or in any way impairing or diminishing the value of, and/or transferring to Steven [] or any person, other than as directed by this Judgment, any property as to which the Estate of Claudette

Monier and/or plaintiff Michelle . . . have a legal and/or beneficial interest, including but not limited to, any and all of the real property and personal property described in section 3 of this Judgment as assets of the involuntary trust or constructive trust described herein; [¶] d. To return, restore, reconvey, surrender and deliver to plaintiff[s] any and all possession, right, title and interest in any and all real property and personal property as to which such plaintiff has a legal and/or beneficial interest, together with any and all earnings, accumulations, income, gains, appreciation, improvements, enhancements, profits or economic benefits derived from such property since the date such property was first obtained, possessed or controlled by defendant Steven [], including but not limited to the following specific items of property: [¶] . . . [¶] (4) Any and all proceeds or payments of insurance benefits paid, transferred or obtained under or pursuant to" the Valley Forge, Fidelity, Globe, and Balboa life insurance policies, "together with any and all earnings, accumulations, gains, emoluments, appreciation and/or enhancements of such insurance policy payments or proceeds that have occurred since [Steven] first acquired purported ownership, possession, dominion and/or control of such insurance policy payments or proceeds"

In November 2006, plaintiffs sought to recover Henderson's attorney fees that were paid with the Valley Forge and Fidelity proceeds received in December 2005 and July 2006, before the entry of judgment in September 2006. Claiming that the money Henderson received prior to the entry of judgment was subject to

the constructive trust, plaintiffs applied for an examination of Henderson as a third-party transferee in order to trace and recover constructive trust property pursuant to Code of Civil Procedure sections 708.110 and 708.120. The trial court granted Henderson's motion for a protective order to prevent plaintiffs from conducting such an examination. Plaintiffs did not appeal from that order.

Thereafter, plaintiffs moved for an order to enforce the judgment by directing Henderson to account for all insurance proceeds he received that were subject to the constructive trust; directing Henderson to deliver the constructive trust property to plaintiffs; and authorizing the sheriff to levy a writ of execution upon any constructive trust property in Henderson's possession.

Henderson opposed the motion, contending plaintiffs were simply attempting to relitigate their unsuccessful previous motion to examine him. He also asserted that in receiving legal fees, he was not acting as Steven's agent and holding or hiding the money for him against the rights of third parties; rather, he was accepting the money in payment of a debt owed to him. Moreover, plaintiffs did not have any ownership interest in the life insurance proceeds as they were not beneficiaries under the policy, and there was no evidence the policies would ever have existed if Steven had not been designated beneficiary, or that the proceeds would ever have been recovered but for Henderson's efforts. That is, had plaintiffs presented a claim to the insurance companies, they could never have recovered the

insurance benefits. Henderson's legal efforts created the insurance policy fund, and under the common fund doctrine, plaintiffs were responsible for at least a portion of his fees and had no right to the insurance funds absent the payment of his fees. Henderson argued that plaintiffs, with their twisted use of the constructive trust doctrine, were attempting to obtain a pretrial and prejudgment writ of attachment without having applied for such a writ or filing a protective bond.

The trial court denied plaintiffs' motion, and this appeal followed.

Plaintiffs fail to show in a straightforward manner that the court erred in denying the motion. They cite to no authority demonstrating that (1) where a defendant, who has wrongfully acquired money upon which a constructive trust is imposed, uses the money to pay an attorney, or a landlord, an employee, or a creditor for services rendered or a debt owed, (2) the services were performed in good faith and the debt was legitimate, rather than a ruse to prevent the beneficiary of the trust from obtaining the money, (3) the debt was paid prior to the entry of judgment imposing a constructive trust against the defendant, then (4) the beneficiary is entitled to recover the money from the attorney, landlord, employee, or creditor because it is traceable to the defendant's wrongfully acquired money.

Instead, they take statements out of context from cases which simply establish that (1) *as to the wrongdoing defendant*, the constructive trust arises by operation of law at the time of the wrongful conduct (*U.S. v. \$4,224,958.57* (9th Cir. 2004) 392 F.3d

1002, 1004); (2) constructive trust funds can be traced to whatever real or personal property the defendant purchased with the funds, and the beneficiary can recover the property from a third party as long as the third party is not a bona fide purchaser for value without good faith notice of the fraud (*Church v. Bailey* (1949) 90 Cal.App.2d 501, 504; *Angelus Securities Corp. v. Luton* (1941) 47 Cal.App.2d 262, 268; *Sanguinetti v. Rossen* (1906) 12 Cal.App. 623); (3) securities brokers who have assisted a fiduciary or a trustee in speculating with trust funds and deceiving the beneficiaries of an investment trust as to the financial stability of the trust are directly liable to the beneficiaries themselves both for breach of fiduciary duty and for aiding and abetting the trustee's breach (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 462-467); (4) where plaintiffs show a reasonable probability of success on the merits in an action seeking a constructive trust remedy, they may obtain a preliminary injunction prior to trial to prevent a dissipation of the profits subject to a constructive trust (*Heckmann v. Ahmanson* (1985) 168 Cal.App.3d 119, 134-136) because where the defendant dissipates money that is subject to a constructive trust, the defendant is not a constructive trustee since he has nothing of the plaintiff's to hold in trust and is liable only in damages (1 Dobbs, *Law of Remedies* (2d ed. 1993), *The Constructive Trust*, § 4.3(2), p. 591); and (5) a trust can be imposed on a person who receives property without consideration when the transfer is in fraud of the transferor's creditors (*Citizens' Bank v. Rucker* (1903) 138 Cal. 606, 609-610).

Plaintiffs believe they may require Henderson to disgorge his attorney fees based on *Pena v. Toney* (1979) 98 Cal.App.3d 534 (hereafter *Pena*), in which a criminal defendant, Kempton, who purchased an automobile with funds stolen from Pena, tried to pay Toney, his criminal defense attorney, by executing a bill of sale to transfer title to the automobile as payment for legal services. (*Id.* at p. 538.) Pena filed a civil action against Kempton and Toney, and requested a restraining order and injunction to prevent the police department from releasing the car. The trial court issued an order prohibiting release of the car to anyone but Pena absent a lawful court order. Accordingly, the certificate of title was never endorsed and remained in police custody, and Toney never had possession of the car. (*Id.* at pp. 538-539.) Kempton pled no contest to the criminal charge of receiving stolen property. Toney filed a motion in Pena's civil action, seeking to recover the vehicle on a replevin theory. (*Id.* at p. 539.) The trial court determined that because the car was purchased with funds stolen from Pena, the car belonged to him not Toney. (*Id.* at pp. 539, 542.)

Pena held the decision was correct and the remedy of a constructive trust was appropriate because Toney never obtained the title to the car and, even if he had, there was an entire absence of proof of his status as bona fide purchaser of the vehicle under California Uniform Commercial Code section 2403.⁶

⁶ California Uniform Commercial Code section 2403 provides in relevant part: "(1) A purchaser of goods acquires all title

(*Pena, supra*, 98 Cal.App.3d at pp. 542-543.) The case did not involve the question whether Toney would be required to return the vehicle if he had received actual possession and title to the car in payment of his attorney fees prior to Kempton's plea of no contest, which established that the car was traceable to stolen funds.

Steven's payment of Henderson's fees with the life insurance proceeds does not fit within any of the aforementioned cases. Steven did not attempt to pay Henderson by transferring property or goods to him that were purchased with funds he had stolen from Claudette. And Henderson did not purchase any of her property from Steven. Moreover, Henderson was not named as a party in plaintiffs' action seeking a constructive trust. Rather, in exchange for hourly attorney fees, Steven retained Henderson to defend Steven against plaintiffs' action and, in exchange for a 40 percent contingency fee, retained him to pursue the two insurance companies that refused to pay life insurance benefits to Steven. Henderson negotiated a settlement with the two companies and recovered \$1,025,000 in life insurance proceeds from them. The checks were made out jointly to

which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though [¶] (a) The transferor was deceived as to the identity of the purchaser, or [¶] (b) The delivery was in exchange for a check which is later dishonored, or [¶] (c) It was agreed that the transaction was to be a 'cash sale,' or [¶] (d) The delivery was procured through fraud punishable as larcenous under the criminal law."

Steven and Henderson, presumably to protect Henderson's lien for attorney fees. (*Siciliano v. Fireman's Fund Ins. Co.* (1976) 62 Cal.App.3d 745, 752 [a contingent fee contract with creation of a lien in favor of counsel gives counsel a lien upon the recovery and the attorney is regarded as an equitable assignee of the judgment or settlement to the extent of fees and costs which are due to counsel for services rendered].) Henderson withheld his fee from the settlement proceeds as he was legally entitled to do. (*Fletcher v. Davis* (2004) 33 Cal.4th 61, 69 [when a settlement draft is made out jointly to the attorney and client and deposited in the client trust account, the attorney may withhold an amount equivalent to the attorney's lien].)

The creation of Henderson's lien, and the payment of his fees, occurred prior to the entry of the judgment imposing the constructive trust on the insurance proceeds. None of plaintiffs' authorities demonstrate that, under such circumstances, they have a greater right to the insurance proceeds than Henderson's right as a creditor and can require him to disgorge his attorney fees via an enforcement of the judgment against Steven. Indeed, the law appears to be otherwise.

A constructive trust is simply a remedy, and is inchoate until its existence is established by court order. (*In re Advent Management Corp.* (Bankr. 9th Cir. 1995) 178 B.R. 480, 488, affd. (1997) 104 F.3d 293.) Once a judgment impressing a constructive trust is entered, the beneficiary of the trust may be given priority over other creditors (1 Dobbs, *Law of Remedies, supra*, *Constructive Trusts*, § 5.18(3), p. 933, fn. 10), but the same is

not true prior to the entry of judgment. (*In re Advent Management Corp., supra*, 178 B.R. at p. 488 [in bankruptcy proceedings, property upon which a party seeks to impose a constructive trust is not excluded from the defendant debtor's estate until a judgment is entered impressing a constructive trust].) "'Because it is a remedy, a constructive trust cannot affect rights in the res until it is imposed,'" and it does not exist until the alleged beneficiary obtains a judicial declaration impressing such a trust. (*Ibid.*, italics omitted; see also *Atlas, Inc. v. United States* (D.C.N.D. 1978) 459 F.Supp. 1000, 1004 [until there was a judgment impressing a constructive trust on specific property in favor of plaintiff, the plaintiff's lien was contingent, inchoate and inferior to a previously filed federal tax lien even though the plaintiff filed its notice of lis pendens before the federal tax lien was filed].)

Because Steven paid Henderson's fees prior to the entry of judgment impressing the insurance proceeds with a constructive trust, and because the payment was for legitimate services and Henderson was not involved in Steven's fraudulent conduct, plaintiffs are not entitled to enforce the judgment against Henderson.

DISPOSITION

The parts of the judgments against Steven and Leila awarding damages to plaintiffs for defendants' negligence are reversed. As discussed in part V of this opinion, (1) the \$360,000 unjust enrichment award against Leila is reversed, and the matter is remanded to the trial court for further proceedings to calculate

the appropriate measure of damages; (2) the judgment against Eulalio is reversed, and the matter is remanded to the trial court for further proceedings and for the entry of a new judgment; and (3) the trial court is directed to clarify or modify the judgments against Steven and Leila awarding compensatory damages to plaintiffs for defendants' unjust enrichment as well as imposing a constructive trust on the property which is the subject of the compensatory damages. The punitive damage awards of \$1 million against Steven and \$100,000 against Leila are reversed. In all other respects, the judgments are affirmed.

The trial court's order denying plaintiffs' motion to enforce the judgment against Henderson is affirmed.

The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

SCOTLAND, P. J.

We concur:

BLEASE, J.

BUTZ, J.